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U.S. Department of Justice

Immigration and Naturalization Service

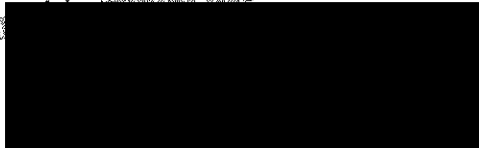
OFFICE OF ADMINISTRATIVE APPEALS

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File: EAC 02 038 52025

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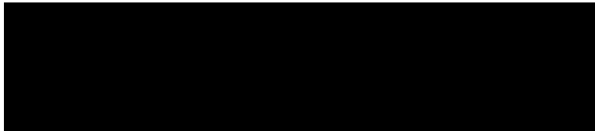
Date: JAN 06 2003

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Helen E. Crawford for
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is in the business of kitchen design and remodeling. It seeks to employ the beneficiary permanently in the United States as a stone carver. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 CFR 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I & N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is February 16, 2001. The beneficiary's salary as stated on the labor certification is \$12.47 per hour for a 35-hour week or \$22,695.40 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. On January 7, 2002, the director requested additional evidence (I-797) to establish the petitioner's ability to pay the proffered wage as of

the priority date and continuing to the present, namely, the petitioner's 2000 W-2 wage and tax statements (W-2s) showing wages paid to all employees and to the beneficiary. Also, the I-797 asked for particulars of the position which, the petitioner said, existed.

In response, counsel submitted copies of the petitioner's bank statements for the period February 2001 to December 2001 and advised that the employer had created a new position that the beneficiary would fill. The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and denied the petition.

On appeal, counsel submits a brief, the petitioner's W-2s for 2001, a form said to be the petitioner's 2001 tax return, and the same bank statements already tendered. Counsel initially offered the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2000, but it showed taxable income before net operating loss deduction and special deductions of \$10,152, less than the proffered wage.

Counsel offers on appeal a form said to be the petitioner's 2001 tax return on which the title is altered and obliterated. One of the duplicates of the first page is signed, but both exemplars pertain to Form 1120S, a federal tax return for an S corporation. Other pages specify U.S. Form 1120. In substance, counsel contends that it shows depreciation of \$14,326 plus net income of \$13,083 for a total of \$27,409, more than the proffered wage.

In determining the petitioner's ability to pay the proffered wage, the Service will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by both Service and judicial precedent. Elatos Restaurant Corp. v. Sava, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F.2d 1305 (9th Cir. 1984)); see also Chi-Feng Chang v. Thornburgh, 719 F.Supp. 532 (N.D. Tex. 1989); K.C.P. Food Co., Inc. v. Sava, 623 F.Supp. 1080 (S.D.N.Y. 1985); Ubeda v. Palmer, 539 F.Supp. 647 (N.D.Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983).

In K.C.P. Food Co., Inc. v. Sava, the court held that the Service had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp. at 1084. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also Elatos Restaurant Corp. v. Sava, 632 F.Supp. at 1054.

Even though the petitioner submitted its commercial bank statements as evidence that it had sufficient cash flow to pay the proffered wage, there is no evidence that they somehow show additional funds beyond those of the tax returns and financial statements. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I & N Dec. 190 (Reg. Comm. 1972).

Counsel contends that, at the priority date, the monthly balance of the bank account at \$16,860.54, though less than the proffered wage, covered the monthly salary. Once again, counsel points to no evidence that the bank accounts somehow represent assets that the tax returns and financial statements of the petitioner do not reflect. Counsel offers no authority to contradict the regulation that prescribes the primary evidence of the ability to pay the proffered wage, viz., annual reports, federal tax returns and audited financial statements. See 8 CFR 204.5(g)(2), *supra*.

Counsel states that the beneficiary's position is a new one and, on appeal, presents W-2s for wages paid to other workers in 2001. They represent funds expended on salaries for others and are not available to pay the beneficiary at the priority date and continuing to the present.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate the financial ability continuing until the beneficiary obtains lawful permanent residence. See Matter of Great Wall, 16 I & N Dec. 142, 145; Matter of Wing's Tea House, 16 I & N Dec. 158 (Act. Reg. Comm. 1977); Chi-Feng Chang v. Thornburgh, 710 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 CFR 204.5(g)(2). 8 CFR 103.2(b)(1) and (12).

After a careful review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.